82-1250

NO.

in the
Supreme Court
of the
United States

OCTOBER TERM 1982

THE STATE OF FLORIDA, on the Relation of GLEN E. SMITH, as trustee,

Petitioner,

vs.

ORANGE COUNTY, a political subdivision of the State of Florida; ALLEN E. ARTHUR; LEE CHIRA; DICK FISCHER; JACK MARTIN; and LAMAR THOMAS, as members and constituting the Board of County Commissioners of Orange County, Florida; FORD S. HAUSMAN, Property Appraiser, Orange County, Florida; EARL K. WOOD, as Tax Collector, Orange County, Florida.

Respondents.

and

Ann Ross, Intervenor and class representative,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA; AND THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT

BYRD V. DUKE, JR.
Attorney for Petitioner
The Executive Building Suite 205
1175 N.E. 125th Street
North Miami, Florida 33161
(305) 891-2532

QUESTIONS PRESENTED

1. Does the Supreme Court of Florida, notwithstanding the District Court's failure to make an express decision, have jurisdiction under (A) supervisory power necessary to protect the provisions of United States Constitution, and the Constitution of State of Florida; (B) implied and inherent power and jurisdiction to correct judicial fundamental error of such constitutional dimension in that enforcement would constitute the impairment or taking of property without due process of law in violation of the U.S. Constitution, 5th and 14th Amendments; (C) implied or inherent jurisdiction and power to correct fundamental error as would constitute the violation or destruction of rights guarantee by Declaration of Rights under the Constitution of Florida, 1968 Revision; (D) discretionary jurisdiction of the Supreme Court to review a district court of appeal which violates a provision of the Constitution of Florida, Article 8 Sec. 2 (a) that when any municipality is abolished a provision shall be made for the protection of its creditors; (E) the "all Writ" necessary and proper to the complete exercise of the Supreme Court jurisdiction.

2. Can a District Court of Appeal go beyond the confines of record on appeal, comb and search the record of a final judgment already heard on appeal by another district court of appeal, and then determine that final judgment against a town does not bind the town inhabitants because "No defaults were entered against the town where such findings are false?" Can the Court after knowledge that its findings are not true, perpetuate said fundamentals by refusing to correct its error?

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Glen E. Smith, as trustee, prays that a Writ of Certiorari issue to review the judgments of (1) The Supreme Court of Florida entered on October 29, 1982 in Glen E. Smith, etc, Petitioner vs Orange County, etc., et al., Case No. 62,806; (2) The District Court of Appeal of the State of Florida, Fifth District entered on September 29, 1982 in Case No. 82-94, The State of Florida on the relation of Glen E. Smith, as Trustee, Appellate v. Orange County, etc., Allen E. Arthur; Lee Chira; Dick Fischer; Jack Martin; Lamar Thomas, etc., Ford S. Hausman, etc., Earl K. Wood, etc., and Ann Ross, etc.

OPINIONS BELOW

The Supreme Court of Florida has issued an opinion in this case, a copy of which appears in Appendix A to this Petition at page App. 1, which is not reported yet.

The District Court of Appeal, Fifth District, State of Florida, has issued its opinion and appears in Appendix B to this Petition, at page App. 3, and is reported on table So.2d 83.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on October 29, 1982. The jurisdiction of this Court invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Does the Supreme Court of Florida, notwithstanding the District Court's failure to make an express decision, have jurisdiction under (A) supervisory power necessary to protect the provisions of United States Constitution, and the Constitution of State of Florida; (B) implied and inherent power and jurisdiction to correct judicial fundamental error of such constitutional dimension in that enforcement would constitute the impairment or taking of property without due process of law in violation of the U.S. Constitution, 5th and 14th Amendments; (C) implied or inherent jurisdiction and power to correct fundamental error as would constitute the violation or destruction of rights guarantee by Declaration of Rights under the Constitution of Florida, 1968 Revision; (D) discretionary jurisdiction of the Supreme Court to review a district court of appeal which violates a provision of the Constitution of Florida, Article 8 Sec. 2 (a) that when any municipality is abolished a provision shall be made for the protection of its creditors; (E) the "all Writ" necessary and proper to the complete exercise of the Supreme Court jurisdiction.

2. Can a District Court of Appeal go beyond the confines of record on appeal, comb and search the record of a final judgment already heard on appeal by another district court of appeal, and then determine that final judgment against a town does not bind the town inhabitants because "No defaults were entered against the town where such findings are false?" Can the Court after knowledge that its findings are not true, perpetuate said fundamentals by refusing to correct its error?

CONSTITUTIONS INVOLVED

This case involves Article 1 Sec. 21; Article 5, Sec. 3 (3) (7) and Article 8 Sec. 2 of Constitution of the State of Florida.

This case also involves Article 1 Sec. 10; Fifth Amendment and Section 1 of the Fourteenth to the Constitution of the United States.

STATEMENT

This is a case where judgment creditor obtained a final judgment in which was affirmed in *Smith v Bithlo*, 344 So.2d 1288 (Fla. 4th DCA) confirming the judgment of prior case, and determining that Town of Bithlo had a duty to levy and collect taxes to pay Petitioner's judgment, but abating that action until officials could be obtained. The legislature passed Chapter 77-502 Law of Florida, effective June 30, 1977 abolishing the Town of Bithlo and requiring all property debts and obligations to be satisfied accordance with general law on April 24, 1978. Orange County was substituted for Town of Bithlo in both suits. The District Court of Appeal, Fifth District issued its decision for rehearing, *Orange County v. Smith*, 395 So.2d 1158 (Fla. 5th DCA 1981) which ignored the established laws of Florida. This decision has been applied in the Motion For Summary Judgment and the last appeal before this District Court of Appeal, Fifth District, and avers Final Judgment is not final because no defaults were entered and it had nothing in the record of persons to handle the levying and collection of taxes. There are documents in the record which show the allegations are false and that

the judgment is final and binding on the inhabitants of the former Town of Bithlo. The trial judge admitted the facts were false, but choose to follow the decision which violated the constitutional rights of Glen E. Smith.

REASONS FOR GRANTING THE WRIT

In Case 73-7910 Petitioner, Glen E. Smith obtained a Final Judgment by Default against the Town of Bithlo on 40 municipal Improvement Bonds in the Circuit Court of Orange County, Florida on October 26, 1956 for $126,790.24 plus $24.10 court costs. All elected officials moved away from the Town and there was no person to accept service of process on the Town of Bithlo. Florida Statutes 47.20 (now repealed) Glen E. Smith filed suit in 1973, Circuit Court, Orange County, Florida, Civil Action 73-7910 to enforce his judgment. The Fourth District Court of Appeal in *Smith v. Bithlo*, 314 So.2d 212 (Florida 4th District DCA 1975) reversed the lower court and held that constructive service and substituted service were valid and also that individual defendants' land excluded from corporate limits was no bar to assessment of taxes for payment of bond-holders who were not parties to judgments of ouster, and ordered a new trial. The case was remanded for a new trial, after retrial, a final judgment was entered in favor of the individual defendant and the action was abated as to the Town of Bithlo. The trial court found that the Town of Bithlo owed the entire amount of Plaintiff's judgment and had a legal duty to Plaintiff to levy and collect the necessary taxes to pay the judgment. The Final Judgment adjudged as follows:

1. The Defendant, B.C. Dodd and H.F. Dietrich and Florence Dietrich, his wife, constituting a class of owners of properties in the Town of Bithlo, shall go hence without day and this action is dismissed with prejudice.

2. As to the Defendant, Town of Bithlo, which is in *default* since no answer and defenses have been filed on its behalf, it cannot raise the defense of laches nor can the individual raise it on its behalf.

3. However, since the court has ruled that the evidence does not show that the Plaintiff is entitled to the remedy it seeks for the reason stated in paragraph 15 of this Final Judgment, this action is abated as to The Town of Bithlo, Florida.

Paragraph 15 stated that Plaintiff has failed to make a sufficient showing by the greater weight of the evidence of the availability of legally qualified individual to serve as councilmen, mayor, clerk and as other public officials for the Town of Bithlo in order for this court to mandate and direct an election be held for the Town of Bithlo. Subsequent appeal, the court said in *Smith v. Bithlo*, 344 So.2d 1288, Fla. 4th DCA 1977 Reversed for further proceedings consistent with its opinion upon the trial court may determine the qualification of these persons and made necessary appointments. The Appellate Court also held that the lapse of time between the original judgment and filing of the present suit is sufficient for laches but the Defendants have failed to prove by clear and positive evidence that the delay resulted in injury, embarassment or disadvantage to them. The evidence is insufficient to support the trial courts conclusion that the doctrine of *laches* applies.

While the appeal set forth above was pending, individuals named Earl Taylor, commenced to serve as Mayor and Ted McElwee, David Shaw, Ralph Kemp, Hobart Strickland and Richard Trimble, as Aldermen of the Town of Bithlo, and thereafter Glen E. Smith filed the present case, a Petition For Writ of Mandamus in the Circuit Court of the 9th Circuit, Civil Action 76-8763, which was abated pending the outcome of Civil Action No. 73-7910 in the Appellate Court.

The Town of Bithlo was abolished by the Florida Legislature effective July 1, 1977 by Chapter 77-502, Law of Florida 1977. Glen E. Smith then moved to substitute Orange County for the Town of Bithlo and to pursue Mandamus against Orange County pursuant to 165.052 (3) (1975). The Order of Abatement was dissolved and the Motion To Substitute was granted on April 24, 1978 as to both cases.

On April 25, 1979 Circuit Judge George N. Diamantis, after the appellate proceedings reported in *Smith v. Bithlo*, 314, So.2d 212, (Fla. App. 4th 1975) and in *Smith v. Bithlo*, 344 So.2d 1228 (Fla. App. 4th DCA 1977) entered a Final Summary Judgment and Order on Other Pending Matters. The 1973 action was a declaratory judgment affirmative relief including mandamus (Appendix C). The Court said:

> "Holder of unpaid municipal bonds and holder of judgments based upon unpaid municipal bonds have the right to compel the municipal to pay the bonded indebtedness. See *State ex rel. Gulf Life Insurance Co. v. City of Live Oak*, 170 So 608, 609; *Brown-Crummer Inv. Co. v. Town of North Miami*, 11 F Supp 73, 77 S D

Fla 1935. In other words, property located in a municipality regardless of when its present owner acquired it, is subject to taxation to pay the municipality's legal debt. Hardship on property is not a legal defense to an action to enforce payment of legal municipal obligations; though hardship may be a factor the court could consider in fashioning remedy (*North Miami, v. Meridith*, 121 F.2d 279 281-282 5 Cir 1941)"

The Defendants nor the intervenors are in a position to raise such defense of *laches*. Orange County and the county officials legally occupy the position that the abolished Town of Bithlo and its officials occupied. The Town of Bithlo never raised the defense of laches in the 1973 litigation. Since the Town of Bithlo never availed itself of any legal defenses, including the defense of laches, its people are now concluded. See *Young v. Miami Beach Improvement Co. et al.* 46 So.2d 26, 30 (Fla. 1950, Supreme Court). *City of New Port Richey, v. State ex rel O'Malley*, 145 So.2d 903, 905-906 (Fla. 2nd DCA 1962).

Orange County took an appeal to the District Court of Appeal 4th District, and the matter was transferred to the Fifth District, after its creation. The matter was argued before the court and the court on June 27, 1980, District Court of Appeal, issued its decision and judgment "PER CURIAM. AFFIRMED" (Appendix D).

(This judgment is not reported)

The District Court of Appeal, 5th District went beyond the record on Motion For Rehearing, held there

was no defaults in prior case (73-7910) and the Defendant County was not foreclosed from raising the defenses of laches.

Glen E. Smith upon receipt of such decision moved the court for a rehearing and furnished to the District Court of Appeal, 5th District two certified copies of Entry of Default against the Town of Bithlo in case no. 73-7910 dated January 14, 1974 and June 4, 1974, (The defaults were part of the record in the first appeal, *Smith v. Bithlo*, 314 So.2d 212 4th DCA 1975). The District Court of Appeal denied Glen E. Smith's Motion For Rehearing. The Appellate Court held "since Bithlo was never actually defaulted and both actions were "abated" as to it, res judicata should not apply in any event. Attached to Motion For Summary Judgment of Plaintiff, Glen E. Smith, are copies of said Defaults in record that went before the Court (R 803-811).

At the Motion For Rehearing the court adopted another false fact there is no evidence in the record before us that anyone was appointed to represent the Town of Bithlo. The record (R 697 and 699) contains a certified copy of Chapter 77-502 Law of Florida, Act of 1977 on June 30, 1977, Orange County was appointed to represent the abolished Town of Bithlo. The provisions of Section 165.052 Fla. Stat. (1977) were triggered and the Plaintiff had the necessary and qualified persons to perform the necessary functions.

Non-user of municipal power does not result in dissolution. The legislature has the sole authority to both establish and dissolve municipalities. *Treadwell v. Town of Oak Hill.* Fla. Supreme Court 1965, 175 So.2d 777.

Guardian ad Litem is a person appointed in the course of litigation for an infant or a person mentally incompetent Rule 1.210 (b) Rules of Civil Procedure (Florida). There is no case or statute authorizing a guardian ad litem for a corporation or inactive municipal corporation. The Appellate Court had no authority to create or change the law merely because the appellate court considered it to be in the best interest of "social justice" without regard to established law. *Flagler v. Flagler* 94 So.2d 594 (1957).

The Final Judgment in case no. 73-7910 was abated until officials could be appointed to levy and collect taxes to pay the creditor judgment on the bonds. Chapter 77-502 Law of Florida of 1977, abolished the Town of Bithlo and Section 165.052 Fla. Statutes (1977) met the requirements and Glen E. Smith had the necessary and qualified persons to perform all functions. The case of *Donaldson Engineering Inc. v. City of Plantation*, 326 So.2d 209 (Fla. 4th DCA 1976) confirmed that a judgment abated to a condition subsequent becomes a final judgment on the happening of the condition subsequent. The city was sued for refund of contribution, and a portion was refunded and the city was allowed to retain portion of contribution towards construction of bridge upon the condition that if the city failed to commence construction of the bridge within 2 years, funds would be refunded. Two years expired and construction had not commenced.

The District Court held that the judgment was a Final Judgment and its legal and factual findings which were conclusively binding upon parties and not subject to relitigation under doctrine of res judicata, and developer was absolutely entitled to refund.

On mandate, Orange County did not amend its answer, or file an additional affirmative defense of laches.

Ann Ross, the intervenor, other than the use of her name, did not participate in trial court proceedings or appellate proceedings above described or hereafter to be set forth.

After *Orange County v. Smith* 395 So.2d 1158, Orange County filed its' Motion For Summary Judgment and used 18 affidavits of land owners (approximately 1,500 land owners in area) that the delay in asserting their rights under the judgments prejudiced innocent parties who purchased land without knowledge of said judgment. The affidavits were to effect (1) they own property in the former incorporated area of Bithlo; (2) at purchase they were not advised of the 1924 bond issue or 1956 judgment; (3) their Warranty Deed did not reflect the judgment; (4) They would not have purchased the property if they had known of the judgment and (5) additional taxes would cause financial hardship on affiant.

Glen E. Smith furnished the trial court two certified copies and furnished the index in the appeal of case no. 73-7910 showing the defaults were entered on January 14, 1974 and June 4, 1974. (R 803-811). The Final Judgment (73-7910) is attached to affidavit of Glen E. Smith (R 705-710). Claude R. Edwards, Circuit Judge stated that he would not correct the error of the District Court of Appeal, 5th District. The lower court granted a Final Summary Judgment to Orange County, Florida.

Appeal was taken to District Court of Appeal, 5th District on two points: (1) The Final Judgment which relieved Orange County to appraise, levy taxes and collect taxes from the property that constituted the abolished Town of Bithlo pursuant to F.S. 165.052 on Plaintiff's judgment on unpaid improvement bonds was an impairment of contract, and a taking of property in violation of State and Federal Constitutional provisions (U.S. Constitution; Article 1, Sec. 10, Amendment V and Amendment XIV; Florida Constitution Article 1 Sec. 10, Article 8 Sec. 2). (2) The decision of the District Court of Appeal, 5th District in *Orange County v. Smith*, 395 So.2d 1158 was judicial impairment of contract and taking of property without due process of law in violation of U.S. Constitution Provision, Article 1, Sec. 10, Amendments V and XIV and Florida Constitution, 1968 Revision, Article 1, Sec 10, Article 8, Sec. 2.

At oral argument before the District Court of Appeal, the Chief Judge Orfinger, stated the court could not correct its error, that only the Supreme Court could correct a mistake, or settle a conflict with the other district courts of appeal.

Thereafter the court issued its judgment or decision "Per Curiam Affirmed".

Florida Constitution, 1968 Revision as modified on March 11, 1980 provides:

(1) Article 5, Section 3 (3) provides that the Supreme Court may review any decision of the District Court of Appeal *** or that *expressly* and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

(2) Article 5, Section 3 (7) * * * all writs necessary to complete exercise of its jurisdiction.

(3) Article 1, Section 21, Access To Court. The courts shall be open to every person for redress of any injury and justice shall be administrated without sale, denial or delay.

(4) Article 8, Sec 2 provides:

> . . ."When any municipality is abolished, provision shall be made for the protection of its creditors."

Glen E. Smith timely filed with the Clerk of Supreme Court a Notice to Invoke inherent or jurisdiction to prevent the taking of property without "due process" in violation of the 5th and 14th Amendment of U.S. Constitution and the Florida Constitution and Declaration of Rights and Discretionary Jurisdiction.

On October 29, 1982 the Supreme Court in case no. 62,806, issued its judgment which stated:

> "It appearing to the Court that it is without jurisdiction, the Petition to Invoke Inherent or Implied Jurisdiction to Prevent the Taking of Property Without "Due Process" in Violation of the 5th and 14th Amendment of U.S. Constitution and the Florida Constitution and Declaration of Rights and Discretionary Jurisdiction is hereby dismissed." (Appendix A).

In *Mutual Ben. Health & Accident Ass'n v. Bunting*, 133 So 321 Florida 1938, the court held:

> Under its constitutional power to issue writs of mandamus, certiorari, prohibitions, quo warranto and other writs necessary or proper to the complete exercise of its jurisdiction, the Supreme Court may exercise supervisory jurisdiction over other courts in conformity with command of Declaration of Rights that all courts shall be open so that every person for any injury done him shall have remedy by due course of law.

A state can no more impair the obligation of an antecedent contract by adopting a constitution or amending its constitution, than by enacting or amending statutes 10 Florida Jur 2d, Constitutional Law Sec. 306.

The result of the words "Per Curiam Affirmed" are just as destructive as an express, long written statement. The Supreme Court has supervisory jurisdiction over the court of Florida. When a fundamental error is committed by a District Court it should not be permitted to ignore a mandate in the Constitution that where a town is abolished, that the creditor must be protected. Is the Court impartial where it goes beyond and outside of the record and adopts false facts, when the record before the Court shows that the false facts are incorrect? The Motion For Rehearing contains the error and notwithstanding the effort to correct, the courts persisted in perpetuating this error which impairs Glen E. Smith's right as judgment creditor on town improvement bonds. A State judicial decision can no

more impair contract than can legislative act. The trial judge, the District Court of Appeal admitted that the decision was erroneous, and nothwithstanding, it would be followed even though it impaired Petitioner's rights as a judgment on municipal bonds in violation of the United States Constitution, and State of Florida Constitution.

In *United States v. City of Cocoa*, District Court, S D Florida 1936, 17 F. Supp 59; *Morton v. Zuckerman-Vernon Corp.* Fla. DCA 3rd 1974, 290 2d 141, the Court held:

> Spirit of constitutional prohibition against impairment of obligation of contracts should govern courts as well as legislative bodies, and the court should never approve any attempt to impair the obligation of contracts, notwithstanding prohibition is only effective against legislative bodies. (Const.art.1, Sec. 10).

Also see, *Brown Crummer Inv. Co. v. Town of North Miami*, District Court, S D Florida, 1935, 11 F. Supp 73.

A judgment against municipal corporation in matters of general interest to all its citizens is binding on them, though they were not parties to the suit. If the municipality fails to avail itself of legal defenses, the people are concluded by the judgment. See *Young v. Miami Beach Improvement Co*, Fla. 46 So.2d 26 (Supreme Court); *City of New Port Richey v. State*, Fla. 2 DCA 1962, 145 So.2d 903.

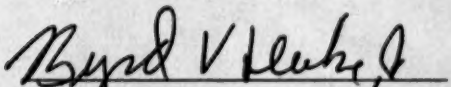
The Final Summary Judgment trial court and the decision of the District Court of Appeal, 5th District, does not protect the judgment creditor of the Town of Bithlo, but destroyed or impaired Plaintiff's judgment on municipal obligation and is the deprivation of property by procedural error which violates "Due Process".

U.S. Constitution, Article 1, Sec 10, Amendments V and XIV.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Byrd V. Duke, Jr.
Counsel for Petitioner
The Executive Building Suite 205
1175 N. E. 125th Street
North Miami, Florida 33161
(305) 891-2532

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies hereof has been furnished each to James F. Page, Jr., Esquire of Gray, Harris & Robinson, attorneys for Respondent, at P.O. 3068, Orlando, Florida, 32802; and Herbert R. Swofford, Esquire, attorney for Ann Ross, at 1212 East Colonial Drive, Orlando, Florida, this 25 day of January, 1983.

Byrd V Duke, Jr.

BYRD V. DUKE, JR.

APPENDIX A

IN THE SUPREME COURT OF FLORIDA
FRIDAY, OCTOBER 29, 1982

CASE NO. 62,806

District Court of Appeal,
5th District – No. 82-94

GLEN E. SMITH, ETC.,

Petitioner,

vs.

ORANGE COUNTY, ETC., ET AL.,

Respondents.

It appearing to the Court that it is without jurisdiction, the Petition to Invoke Inherent or Implied Jurisdiction to Prevent the Taking of Property Without "Due Process" in Violation of the 5th and 14th Amendment of U.S. Constitution and the Florida Constitution and

the Declaration of Rights and Discretionary Jurisdiction is hereby dismissed.

cc: Hon. Frank J. Habershaw, Clerk
Hon. William D. Gorman, Clerk
Hon. Claude R. Edwards, Judge

Byrd V. Duke, Jr., Esquire
James F. Page, Jr., Esquire
Herbert R. Swofford, Esquire

A True Copy
TEST:

/s/ Sid J. White
Sid J. White
Clerk Supreme Court
Swofford, Esquire

APPENDIX B

[NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT
JULY TERM 1982

CASE NO. 82-94

THE STATE OF FLORIDA, on the relation of GLEN E. SMITH, as trustee

Appellant,

v.

ORANGE COUNTY, etc., ALLEN E. ARTHUR; LEE CHIRA; DICK FISCHER; JACK MARTIN; and LAMAR THOMAS, etc., FORD S. HAUSMAN, etc.,; EARL K. WOOD, etc., and ANN ROSS, etc.,

Appellees.

Decision filed September 29, 1982

Appeal from the Circuit Court for Orange County, Claude R. Edwards, Judge.

Byrd V. Duke, Jr., North Miami, for Appellant.

James F. Page, Jr., of Gray, Harris & Robinson, P.A., Orlando, for Appellees.

PER CURIAM.

AFFIRMED.

ORFINGER, CJ., DAUKSCH and UPCHURCH, F., JJ., concur.

APPENDIX C

IN THE CIRCUIT COURT, NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. 76-8768

THE STATE OF FLORIDA, on the relation of GLEN E. SMITH, as Trustee,
Plaintiff,

vs.

ORANGE COUNTY, a political subdivision of the State of Florida, et al,
Defendants,

vs.

ANN ROSS,
Intervenor and Class Representative.

FINAL SUMMARY JUDGMENT and ORDER ON OTHER PENDING MATTERS

THIS MATTER came before the Court upon the plaintiff's motion for summary judgment and also upon the motion of the defendants to add additional affirmative defenses and upon the motion of the intervenor, Ann Ross, to intervene. This case involves an action by the plaintiff to mandamus the defendant, Orange County, and the defendant-county officials to appraise, levy taxes on, and collect taxes from the property that comprised the presently abolished Town of Bithlo pursuant to the provisions of *Section 165.052, Fla. Stat. (1977)* in

order to satisfy a judgment, dated October 26, 1956, in the amount of $126,790.24 plus costs of $24.10, which the plaintiff recovered against the Town of Bithlo. Presently, there is due on such judgment an amount in excess of $296,615.00. The Town of Bithlo was abolished in 1977 by *Chapter 77-502, Laws of Florida.* In addition to the 1956 suit, the plaintiff instituted a suit in 1973 to mandamus the then inactive Town of Bithlo and for other relief. Appellate proceedings involving that suit are reported in *Smith v. Bithlo,* 314 So.2d 212 (Fla. App. 4th 1975) and in *Smith v. Bithlo,* 344 So.2d 1288 (Fla. App. 4th 1977). The Court heard arguments of counsel and has reviewed the memoranda filed with the Court. It is hereby

ORDERED AND ADJUDGED AS FOLLOWS:

1. The Court has jurisdiction over the parties and of the subject matter.

2. The motion of the intervenor, Ann Ross, to intervene is granted subject to the provisions of *Rule 1.230, Fla. R. Civ. P.* which provides that the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding.

3. The defendants' motion to add additional affirmative defenses is granted.

4. The plaintiff's motion for summary judgment is granted since there is no genuine issue of material fact and the plaintiff is entitled to a summary judgment as a matter of law as stated hereinafter.

In this regard the Court holds that Orange County and its commissioners, under applicable state law, have a duty to levy taxes within the geographic limits of the abolished Town of Bithlo, which limits were specifically defined and set forth in its charter as Sections 21, 22, 27, and 28, all in Township 22 South, Range 32 East, Orange County, Florida, in order to pay its valid debts, which includes the judgment involved in this matter. See *Article 8, Section 2, Fla. Const.; Section 165.052, Fla. Stat.* (1977); *Section 165.071, Fla. Stat.* (1977); *Chapter 77-502, Laws of Florida.* The tax collector of Orange County has a legal duty to collect these taxes and the tax appraiser of Orange County has a legal duty to appraise the land which was included in the abolished Town of Bithlo. *Section 165.052, Fla. Stat.* (1977).

As far as the purported defenses are concerned, the Court holds that such defenses are clearly without merit. The 1956 judgment entered against the Town of Bithlo is binding not only on it, but on every taxpayer and property owner of Bithlo regardless of whether such taxpayer and property owner acquired his land prior to or subsequent to the entry of the plaintiff's 1956 judgment against the Town of Bithlo. See *City of New Port Richey v. State el rel. O'Malley,* 145 So.2d 903, at pages 905-906 and the authorities cited therein (Fla. App. 2nd 1962). Orange County and its officials now legally occupy the same position as the Town of Bithlo and its officials occupied in regard to the legal duty to levy and collect the necessary taxes from the property that was located in and comprised such town in order to satisfy the plaintiff's judgment.

The defendant's and the intervenor's defense or laches which is to the effect that the property owners

who acquired their property subsequent to the entry of such judgment are not bound by it, since it was not recorded in the public records and because a lis pendens was not filed in regard to the land located in the Town of Bithlo and to enforce this judgment against such property owners who puchased their property without knowledge of that judgment would cause a financial hardship on them, entirely misses the mark. Holders of unpaid municipal bonds and holders of judgments based upon unpaid municipal bonds have the right to compel the municipality to pay the bonded indebtedness. See *State ex rel. Gulf Life Ins. Co. v. City of Live Oak*, 170 So. 608, 609 and the authorities cited therein (Fla. 1936); *State ex rel. Babson v. City of Sebring*, 155 So. 669, 672 (Fla. 1934); *Brown-Crummer Inv. Co. v. Town of North Miami*, 11 F. Supp. 73, 77 (S.D. Fla. 1935). In other words, property located in a municipality, regardless of when its present owner acquired it, is subject to taxation to pay the municipality's legal debts. Hardship on property owners is not a legal defense to an action to enforce payment of legal municipal obligations; though hardship may be a factor the Court could consider in fashioning a remedy. See. *North Miami, Florida v. Meredith*, 121 F.2d 279, 281-282 (5th Cir. 1941).

Further, neither the defendants nor the intervenors is in any position to raise such defense of laches. Orange County and the county officials legally occupy the position that the abolished Town of Bithlo and its officials occupied. In other words, the defendant, Orange County, and the defendant officials are identified with the Town of Bithlo and its officials in regard to the legal duty to levy and collect the necessary taxes to pay the plaintiff's judgment. The Town of Bithlo in the 1973 declaratory judgment

litigation never raised the defense of laches nor did it raise such defense in the earlier 1956 litigation in which the subject judgment was entered. This Court ruled in the 1973 litigation "that the Town of Bithlo owed the entire amount of plaintiff's judgment and had a legal duty to plaintiff to levy and collect the necessary taxes to pay the judgment." See *Smith v. Bithlo, supra*, 344 So.2d 1288. Since the Town of Bithlo never availed itself of any legal defenses, including the defense of laches, its people are now concluded. See *Young v. Miami Beach Improvement Co.*, 46 So.2d 26, 30 (Fla. 1950); *City of New Port Richey v. State ex rel. O'Malley, supra*, 145 So.2d 903, 905-906. Also, the defense of the statute of limitations is clearly without merit because the present action was filed well within the requisite twenty year period.

The Court also holds that *Section 165.052, Fla. Stat.* (1977) is constitutional and therefore the Court rejects the defendants' and intervenor's position that such statute is unconstitutional because it is an ex post facto law and tax. If anything, said *Section 165.052, Fla. Stat.* (1977) prevents the abolishment of the Town of Bithlo from impairing the obligation of contract in contravention of the applicable United States constitutional provision. Cf. *Brown-Crummer Inv. Co. Town of North Miami, supra*, 11 F.Supp. 73, at p.76.

5. Consequently, the Court holds that the plaintiff is entitled to a peremptory writ mandating that the defendant, Orange County, and the defendant, board of commissioners, levy and collect the taxes in regard to Sections 21, 22, and 28, Township 22 South, Range 32 East, Orange County, Florida, which comprised the

abolished Town of Bithlo, and to a writ mandating that the tax appraiser appraise such property and the tax collector collect the necessary taxes.

6. Therefore, Orange County, its Board of County Commissioners, the County Tax Appraiser and Tax Collector, shall within thirty days submit to the Court a proposed tax plan under which the subject judgment of $126,790.24, together with costs of $24.10, plus any and all accrued interest and any future interest can be satisfied in a period not to exceed ten years. A copy of this plan shall be served upon plaintiff's counsel and all other counsel of record. Upon receiving such plan or upon the expiration of such thirty day period, the plaintiff shall have thirty days to file any objections or amendments to the plan or his own plan and serve copies on all counsel. If the plaintiff does not file any amendments or objections or his own plan, the plan shall be deemed acceptable. However, the plaintiff either objects in whole or in part to the plan or offers any amendments to the plan or his own plan, the Court will consider this matter further and enter any other orders that may be necessary. If neither a plan nor an acceptable plan is filed with the Court, it may adopt its own plan.

7. The Court retains jurisdiction over the parties and of the subject matter to the full extent allowed by law to enter any further orders that may be necessary to effectuate this order of the Court.

DONE AND ORDERED in Chambers at the Orange County Courthouse, Orlando, Florida, this 25th day of April, 1979.

/s/ George N. Diemetre
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail this 25th day of April, 1979, to Byrd V. Duke, Jr., Esquire, Executive Building, Suite 205, 1175 N.E. 125th Street, North Miami, Florida 33161; Steven R. Bechtel, Esquire, Southeast National Bank Bldg., Suite 600, Orlando, Florida; James F. Page, Jr., Esquire, P.O. Box 30__ Orlando, Florida and to Herbert R. Swofford, Esquire, 1212 E. Colonial Drive, Orlando, Florida 32803.

/s/ Mertice E. Hand
Secretary to Circuit Judge

APPENDIX D

[NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING PETITION, AND, IF FILED, DISPOSED OF]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT
JANUARY TERM 1980

CASE NO. 79-1508/T4-648

ORANGE COUNTY, a political subdivision of the State of Florida,

Appellant,

v.

THE STATE OF FLORIDA, on the relation of GLEN E. SMITH, as Trustee, and ANN ROSS,

Appellees.

Decision filed June 27, 1980

Appeal from the Circuit Court for Orange County, George N. Diamantis, Judge.

James F. Page, Jr. of Gray, Adams, Harris & Robinson, P.A., Orlando, for Appellants.

Byrd V. Duke, Jr., North Miami, for Appellee, Glen E. Smith.

PER CURIAM.

AFFIRMED.

DAUKSCH, C.J., COBB and SHARP, W., JJ., concur.

APPENDIX E

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

JANUARY TERM 1981

CASE NO. 79-1508/T4-648

ORANGE COUNTY, a political subdivision of the State of Florida,

Appellants,

v.

THE STATE OF FLORIDA, on the relation of GLEN E. SMITH, as Trustee and ANN ROSS,

Appellees.

Opinion filed February 25, 1981

Appeal from the Circuit Court for Orange County, George N. Diamantis, Judge.

James F. Page, Jr., of Gray, Adams, Harris & Robinson, P. A., Orlando, for Appellants.

Byrd V. Duke, Jr., North Miami, for Appellee Glen E. Smith.

ON MOTION FOR REHEARING

SHARP, W., J.

The Motion for rehearing is granted because this court overlooked the fact, due to the voluminous record in this case and the inadequacy of the briefs, that the City of Bithlo was never defaulted in the prior litigation, and therefore the substituted party, Orange County, should not be foreclosed from raising the defense of laches.

The appellee filed suit in 1956 to recover the principal and interest due in improvement bonds issued by the City of Bithlo in 1924, and obtained a judgment. No action was taken to recover on the judgment until 1973, when suit was filed against Bithlo in case number 73-7910. This suit against Bithlo was "abated" for insufficiency of process. On appeal this judgment was reversed on other grounds.[1] After remand the trial court said Bithlo could not raise the defense of laches because it was "in default," although apparently no default was ever obtained against Bithlo. The trial court then abated the action as to Bithlo because there were no qualified persons who were willing to perform any governmental function connected with Bithlo. This judgment was also appealed.

While the appeal was pending the appellant brought suit for mandamus in an effort to compel Bithlo to levy taxes to pay the judgment. The trial court abated that suit until the appellate court rendered its decision in the case on appeal.

---

[1]*Smith v. Bithlo*, 314 So.2d 212 (Fla. 3d DCA 1975).

The appellate court was informed that there were persons willing to serve on behalf of Bithlo. It stated that upon remand the trial court could determine the qualifications of these people and make the necessary appointments to represent the City of Bithlo.[2] There is no evidence in the record before us that anyone was ever so appointed or that this action was ever revived.

The lower court ordered that the mandamus suit and the earlier suit travel together as companion cases. Orange County was substituted as Bithlo's "alter ego"[3] and for the first time it sought to raise the defense of laches on behalf of Bithlo. The trial court held Orange County was barred from raising this defense, and that is the issue presented on this appeal.

Bithlo and Orange County never had an opportunity to raise the defense of laches in either suit. During this litigation Bithlo had ceased to function and to exist for all practical purposes, and there were no people or agents to represent it. Both the trial and appellate courts recognized this fact. Bithlo was analogous to an incompetent for whom no guardian had been appointed or a deceased person for whom no personal representative existed. Under these circumstances it would be inequitable to bar Orange County from raising this defense even if the doctrine of res judicata or collateral estoppel applied. *de Cancino v. Eastern Airlines, Inc.*, 283 So.2d 97 (Fla. 1973). However, since Bithlo was never actually defaulted, and both actions were "abated" as to it, res judicata

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[2]Smith v. Bithlo, 344 So.2d 1288 (Fla. 4th DCA 1977).

[3]Ch. 77-502, Laws of Florida.

should not apply in any event. *Burleigh House Condominium, Inc. v. Buchwald*, 368 So.2d 1316 (Fla. 3d DCA), *cert. denied* 379 So.2d 203 (1979); *Donaldson Engineering, Inc. v. City of Plantation*, 326 So.2d 209 (Fla. 4th DCA 1976). The summary judgment appealed is reversed in so far as it forecloses the right of Orange County to plead and attempt to prove the defense of laches. This matter is remanded to the trial court to permit the appellants to file an answer and any affirmative defenses available to it.

REVERSED and REMANDED.

DAUKSCH, CJ. and COBB, J., concur.

APPENDIX F

[FILED Jan 14, 1974]

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT OF FLORIDA
ORANGE COUNTY, FLORIDA

Case No. 73-7910

Glen E. Smith, as trustee

Plaintiff,

v.

The Town of Bithlo, et al

Defendant

Date: Jan. 14, 1974

ENTRY FOR DEFAULT

It appearing that: The Town of Bithlo defendant(s) in the above entitled suit has been duly served according to law, and said Defendant(s) having failed to file or serve any paper in the action, a default is hereby entered against said defendant(s).

RANDALL P. KIRKLAND
Clerk of Circuit Court

By /s/ Betty Andrews
As Deputy Clerk

APPENDIX G

[NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING PETITION, AND, IF FILED, DISPOSED OF]

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT
JANUARY TERM 1980

CASE NO. 79-1508/T4-648

ORANGE COUNTY, a political subdivision of the State of Florida,

Appellant,

v.

THE STATE OF FLORIDA, on the relation of GLEN E. SMITH, as Trustee, and ANN ROSS,

Appellees.

Decision filed June 27, 1980

Appeal from the Circuit Court for Orange County, George N. Diamantis, Judge.

James F. Page, Jr. of Gray, Adams, Harris & Robinson, P.A., Orlando, for Appellants.

No. 82-1250

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

THE STATE OF FLORIDA, ON THE RELATION OF GLEN E. SMITH, AS TRUSTEE,

Petitioner,

v.

ORANGE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA; ALLEN E. ARTHUR; LEE CHIRA; DICK FISCHER; JACK MARTIN; AND LAMAR THOMAS, AS MEMBERS AND CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF ORANGE COUNTY, FLORIDA; FORD S. HAUSMAN, PROPERTY APPRAISER, ORANGE COUNTY, FLORIDA; EARL K. WOOD, AS TAX COLLECTOR, ORANGE COUNTY, FLORIDA.

Respondents.

AND

ANN ROSS, INTERVENOR AND CLASS REPRESENTATIVE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

THE STATE OF FLORIDA, ON THE RELATION OF GLEN E. SMITH, AS TRUSTEE,

Petitioner,

v.

ORANGE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA; ALLEN E. ARTHUR; LEE CHIRA; DICK FISCHER; JACK MARTIN; AND LAMAR THOMAS, AS MEMBERS AND CONSTITUTING THE BOARD OF COUNTY COMMISSIONERS OF ORANGE COUNTY, FLORIDA; FORD S. HAUSMAN, PROPERTY APPRAISER, ORANGE COUNTY, FLORIDA; EARL K. WOOD, AS TAX COLLECTOR, ORANGE COUNTY, FLORIDA.

Respondents.

AND

ANN ROSS, INTERVENOR AND CLASS REPRESENTATIVE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Town of Bithlo issued bonds in 1924 that were never fully paid. The Town of Bithlo permanently ceased to function as a local government during World War II.

Petitioner, Glen E. Smith, obtained a final judgment by default against the Town of Bithlo in October, 1956, Case No. C.L. 28154. A certified copy of the judgment was never recorded in the Official Record Books as required by statute to impose a lien on real property in the Town of Bithlo.

Petitioner, Glen E. Smith, filed suit in 1973 in Case No. 73-7910 to enforce the judgment from Case No. C.L. 28154. Count I was a request to have the Circuit Court appoint a City Council and require it to certify a tax roll to the County Tax Assessor to pay the 1956 judgment. Count II was directed to B. C. Dodd and Mr. and Mrs. Fred Dietrich, individually and as class representatives, for other persons whose property had been ousted from the Town of Bithlo. Circuit Judge Richard Cooper ruled that the action against the Town of Bithlo be abated until proper service was obtained on Bithlo, and that the Petitioner take nothing from Mr. Dodd or Mr. and Mrs. Dietrich.

The District Court of Appeal of Florida, Fourth District, reversed Judge Cooper's ruling stating that since the Petitioner judgment-holder was not a party to the ouster suits of Mr. Dodd and Mr. and Mrs. Dietrich, that such ouster judgments were not binding as to the Petitioner. The court also ruled that service was valid on the Town of Bithlo and that the abatement was in error. *Smith v. Bithlo*, 314 So. 2d 212 (Fla. 4th DCA 1975).

The case was sent back for a new trial and was retried on the same pleadings by the Petitioner and the Defend-

ants. Attorney Johnie McLeod, representing Mr. Dodd and Mr. and Mrs. Dietrich, requested that an attorney ad litem be appointed for the Town of Bithlo to represent the landowners in the Town of Bithlo. Judge Diamantis denied that request. Judge Diamantis then ruled that

> Paragraph 9. The government of the Town of Bithlo ceased to function during the Second World War.
>
> IT IS THEREFORE ORDERED AND ADJUDGED:
>
> 3. However, since the Court has ruled that the evidence does not show that the Plaintiff is entitled to the remedy it seeks for the reasons stated in paragraph 15 of this Final Judgment, this action is abated as to the Town of Bithlo, Florida.
>
> 4. The abatement as to the Town of Bithlo, Florida, shall remain in full force and effect until further Order of Court.

Petitioner, Glen E. Smith, again appealed to the District Court of Appeal of Florida, Fourth District. The judgment based on laches in favor of Mr. Dodd and Mr. and Mrs. Dietrich was reversed, and the appellate court was informed at oral argument that there were persons willing to serve on behalf of the Town of Bithlo as its City Council. It stated that upon remand the trial clerk could determine the qualifications of these people and make the necessary appointments to represent the Town of Bithlo. *Smith v. Town of Bithlo,* 344 So. 2d 1288 (Fla. 4th DCA 1977). There is no evidence in the record that anyone was ever so appointed or that the abatement ordered by Judge Diamantis was ever lifted as to the Town of Bithlo.

While Action No. 73-7910 was pending in the appellate court, the Petitioner filed a mandamus case, Case No. 76-8768, in the Circuit Court in Orange County, Florida.

Case No. 76-8768 was abated pending the outcome of Case No. 73-7910. The lower court ordered that the mandamus suit and the earlier suit travel together as companion cases.

The Town of Bithlo was abolished by the Florida Legislature effective July 1, 1977, by Chapter 77-502, Laws of Florida, 1977. Glen Smith then moved to substitute Orange County for the Town of Bithlo and to pursue Mandamus against Orange County pursuant to § 165.052(3), Florida Statutes (1976) (App. I).

The Order of Abatement in Case No. 87-8768 was dissolved and the Motion to Substitute was granted. Orange County filed an Answer and Affirmative Defenses raising the defense of laches. Ann Ross, individually and as class representative, filed a Motion to Intervene and an Intervenor's Answer and Affirmative Defenses. Ann Ross represented the entire class of taxpayers who live in the area sought to be taxed by Plaintiff. She alleges that she had purchased her property in the Bithlo area in 1970.

All parties filed Motions for Summary Judgment and supporting Affidavits. Orange County filed Affidavits establishing a factual basis for the operation of the doctrine of laches. For example, Mr. Paul Lafata's Affidavit stated:

> 1. That he owns real property which is located in the former incorporated area of Bithlo, Florida, more particularly described as follows:
>
> Tract #17, BITHLO RANCHES ANNEX, an unrecorded plat described as follows: The North 150 feet of the South 390 feet of the East 150 feet of the Northeast 1/4 of the Southeast 1/4 of Section 27, Township 22 South, Range 32 East;

all lands situate and being in Orange County, Florida.

2. That when he purchased the real property in 1978 he had no knowledge and was not advised of the 1924 Bond Issue of the City of Bithlo, or the 1956 judgment for payment of the principal and interest of the bonds.

3. That he did not reside in the Bithlo area when the 1924 bonds were issued or when the 1956 judgment was entered.

4. That in connection with the purchase of the property, he obtained a Warranty Deed which did not reflect the Judgment entered in 1956.

5. That if he had known of the Judgment, he would not have purchased this property.

6. That the assessment of additional taxes would cause a financial hardship for me which could result in the loss of my property for non-payment of taxes.

7. That I have personal knowledge of the facts contained herein.

8. That I received a title insurance policy from American Title Insurance Company when I purchased the property, the original of which is attached as Exhibit "A".

9. That I relied on the title insurance policy to show me any clouds, defects or potential problems with the property.

10. That I was present and witnessed Mrs. Thelma B. Joyner sign the Deed to us on August 3, 1978, at Orlando, Florida, at the American Title Insurance Company offices, at 639 East Colonial Drive. The original of the deed is attached as Exhibit "B".

The title policies attached as Exhibit "A" on Mr. Lafata's Affidavit and other abstracts and opinions of title filed in the record with other affidavits of various landowners did not disclose the existence of the 1956 judgment.

Mr. Lafata's situation was allowed to occur because Petitioner never recorded a certified copy of his 1956 final judgment in the Official Record Books in Orange County or filed a Lis Pendens in the 1956, 1973 and 1976 actions. Orange County made out a prima facie case of laches that was not rebutted in any way by Glen E. Smith in affidavit form or otherwise.

The trial court entered an order on April 25, 1979, granting Ann Ross' Motion to Intervene and granting the Motion for Summary Judgment in favor of the Petitioner, Glen E. Smith, on the basis that Orange County was barred from raising laches as a defense.

Because a new district court had been created for Central Florida, Orange County appealed to the District Court of Appeal of Florida, Fifth District, which initially per curiam affirmed the Summary Judgment, but in an order on Motion for Rehearing dated February 25, 1981, reversed the Summary Judgment, thereby allowing Orange County to raise the defense of laches. *Orange County v. Smith,* 395 So. 2d 1158 (Fla. 5th DCA 1981) (App. B).

Petitioner, Glen E. Smith, filed a Motion for Rehearing (App. C) that was denied (App. D).

Petitioner, Glen E. Smith, unsuccessfully sought review in the Supreme Court of Florida (App. E).

After the case was returned to the trial court, Orange County again filed a Motion for Summary Judgment and additional Affidavits similar to Mr. Lafata's. On

December 16, 1981, the Circuit Court granted Orange County and Ann Ross, Intervenor, a Final Summary Judgment (App. F). The District Court of Appeal of Florida, Fifth District, affirmed the Final Summary Judgment (App. G). The Supreme Court of Florida declined to accept jurisdiction of the case (App. H).

QUESTIONS PRESENTED

I. WAS A FEDERAL QUESTION DECIDED IN THE STATE COURT SYSTEM IN FLORIDA?

Impairment of contract was raised for the first time by Petitioner before the District Court of Appeal of Florida, Fifth District, in Case No. 82-94. It was never raised in the trial court as an avoidance of the affirmative defense of laches raised by Respondent as required by Florida Rules of Civil Procedure, Rule 1.100(a).

> (a) *Pleadings.* There shall be a complaint or, when so designated by a statute or rule, a petition, and an answer to it; an answer to a counterclaim denominated as such; an answer to a cross-claim if the answer contains a cross-claim; a third party complaint if a person who was not an original party is summoned as a third party defendant and a third party answer if a third party complaint is served. If an answer or third party answer contains an affirmative defense and the opposing party seeks to avoid it, he shall file a reply containing the avoidance. No other pleadings shall be allowed.

The Petitioner never challenged the facts which gave rise to the defense of laches and did not appropriately avoid the defense of laches.

The Petitioner's theory of impairment of contract completely overlooks the fact that he is not suing on a contract, which in this case took the form of municipal

bond, but is rather attempting to enforce by mandamus a final judgment entered in his favor in 1956. The Petitioner's rights under the municipal bond merged into the final judgment. *Gilpin v. Bower,* 12 So. 2d 884 (Fla. 1943). The defense of laches raised by Orange County relates to rights that have developed since the judgment in 1956. Laches can be a defense to enforcement of a final judgment. On a case not too dissimilar to the case at bar where an owner of a judgment rendered in 1926 who wanted to levy in 1946 on real property that the judgment debtor had obtained by foreclosure in 1929, that had since been transferred to third parties, the Suprme Court of Florida sitting en banc held:

> Appellants may satisfy their judgment within 20 years, but when undue delays are exercised without reason shown therefor, equitable defenses become available that may cut off the right to satisfy the judgment. In the 17 years of silence, many things could take place that would make it unconscionable to satisfy the judgments in question. The court below refused to grant relief, and we cannot say that he committed error in the light of defenses raised. *Orr vs. Allen-Hanford,* 27 So. 2d 823 (Fla. 1946).

In *Blocker v. Ferguson,* 47 So. 2d 694 (Fla. 1950), the Supreme Court of Florida also sitting en banc held that the rights of a party under a decree in his favor for money damages can forfeit those rights by his actions if they constitute laches.

Cases cited by Petitioner in support of his impairment of contract theory did not deal with judgment creditors attempting to enforce their rights. The cases of *Morton v. Zuckerman-Vernon Corp.,* 290 So. 2d 141 (Fla. 3d DCA 1974), and *United States ex rel. Vermont Investment Co. v. City of Cocoa,* 17 F. Supp. 59 (S.D. Fla.

1936), relate to judicial intervention between mortgagors and mortgagees in situations where there is a dispute over the terms and conditions of the purchase contract.

In the case at bar, all Petitioner's rights that he was entitled to as the holder of the bonds were established and perfected by the final judgment in 1956. It is what has happened since 1956 which has caused his rights under the judgment to be called into question. In upholding laches in this action, the State of Florida has not impaired the contract rights of the Petitioner, nor has it cast any shadow on the ability of any municipal corporation to raise money through bond indentures.

No federal question was properly raised in the state court, nor does one exist. None of the citations by Petitioner to the Constitution of the United States or the Amendments thereto are applicable.

Article I, Sec. 10, of the Constitution of the United States refers to the proposition that no state shall pass any law impairing the obligation of contracts. Aside from the basic fact that the Petitioner is suing on a judgment, not a contract, the Legislature of the State of Florida did not pass any laws which impaired any of his rights. In fact, Chapter 77-502, Laws of Florida, abolished the Town of Bithlo and § 165.052(3), Florida Statutes (1976) (App. I), allowed Orange County to be substituted as party-defendant in its stead.

The Fifth and Fourteenth Amendments to the Constitution of the United States only possible connection with this case is that they refer to the right of a citizen not to have his property taken without due process of law. This case has had an abundance of due process of law with four trips through the state appellate court system and three trips to the Supreme Court of Florida.

The Petitioner lost in the state courts because he did not perfect his rights after receiving the 1956 final judgment by giving the required public notice. Section 55.10, Florida Statutes (Laws of Florida 1939, Chapter 19270), provides:

> No judgment or decree hereafter rendered by the Circuit Courts of any other courts of this state shall be or become a lien on real estate until a certified transcript of said judgment or decree is recorded in the judgment lien record as provided by Section 28.21, subsection (11), of these statutes. Upon being so recorded, said judgment or decree shall become a lien on the real estate only in the county where the same is recorded in the manner provided by Section 28.21.

Petitioner did not comply with § 55.10, Florida Statutes, as Circuit Judge George Diamantis' Final Judgment in Case No. 73-7910, dated April 2, 1976, specifically found:

> Plaintiff's judgment was not recorded other than the minute book and the evidence shown that there has been property bought in Bithlo by one of the defendants after that suit was filed. Further, Plaintiff never filed a Lis Pendens in that case (C.L. 28154).

Not only did Petitioner fail to file a Lis Pendens in the 1956 suit, but it also failed to file a Lis Pendens in the 1973 suit and the 1976 suit.

As set forth more fully in Respondent's Motion for Rehearing (App. A), members of the public purchased land in Bithlo after 1973, and there was still no record notice that the Petitioner was attempting to enforce rights against the property they were purchasing.

The opinion by the District Court of Appeal of Florida, Fifth District, February 25, 1981 (App. B), held that the doctrine of res judicata cannot be used to bar Orange County from raising a defense of laches because it would be inequitable to do so and the Court cited *deCancino v. Eastern Airlines, Inc.*, 283 So. 2d 97 (Fla. 1973). The Court thereafter inaccurately found that no default has been entered against the Town of Bithlo. Although the lack of a default was not the premise of the Court's holding, Petitioner quickly pointed out in its Motion for Rehearing (App. C) that Bithlo had been twice defaulted. The Court properly chose not to reverse its ruling on rehearing.

In the next appeal, 82-94, to the District Court of Appeal of Florida, Fifth District, Chief Judge Orfinger did not, as Petitioner implied, say that the Court had erred in its previous ruling, but said that even if it had erred, it couldn't change its ruling because of the *State of Florida v. Judges of the District Court of Appeal of Florida, Fifth District*, 405 So. 2d 980 (Fla. 1981), which held that the power of an appellate court to recall its mandate and reconsider a case is limited to its term of court.

There are adequate and independent non-federal grounds for the decisions that have been reached by the state courts. It is well accepted that the Supreme Court of the United States will not review a decision of the state court resting upon adequate and independent non-federal grounds. *Bell v. Maryland*, 378 U.S. 226, 12 L. Ed. 2d 822, 84 S. Ct. 1841.

Without conceding that a federal question is even present, the United States Supreme Court is without jurisdiction to review a case if the state court rests its decision on both state and federal grounds, either of

which is dispositive. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 53 L. Ed. 2d 965, 97 S. Ct. 2849.

In summary, although this may be one of the most complex, convoluted case histories the Court has seen in a while, the simple fact remains that the defense of laches prevailed because the Petitioner did not perfect his rights in the 1956 judgment as required by § 55.10, Fla. Stat. (1939), and by failing to file an appropriate Lis Pendens. Thereafter, much like bona fide purchasers for value, the public purchased land in Bithlo without knowledge of the judgment that Petitioner now seeks to levy a tax that the landowner would have to pay pursuant to § 165.052(3), Fla. Stat. (1965) (App. I). Not to allow Orange County to present the defense of laches would be a travesty of justice and totally inequitable. The District Court of Appeal of Florida, Fifth District, held in Case No. 79-1508 (App. B):

> Orange County was substituted as Bithlo's "alter-ego" and for the first time is sought to raise the defense of laches on behalf of Bithlo. The trial court held Orange County was barred from raising this defense, and that is the issue presented on this appeal.
>
> Bithlo and Orange County never had an opportunity to raise the defense of laches in either suit. During this litigation, Bithlo had ceased to function and to exist for all practical purposes, and there were no people or agents to represent it. Both the trial and appellate courts recognized this fact. Bithlo is analogous to an incompetent for whom no guardian has been appointed or a deceased person for whom no personal representative existed. Under these circumstances it would be inequitable to bar Orange County from raising this defense, even if

the doctrine of res judicata or collateral estoppel applied. *deCancino v. Eastern Airlines, Inc.*, 283 So. 2d 97 (Fla. 1973).

Petitioner's argument really boils down to the fact that he doesn't like the quoted ruling. Petitioner claims that this is an unconstitutional taking of his property without due process of law. Such is not the case. The District Court was simply following a precedent set forth in *Orr v. Allen-Hanford, supra,* and *Blocker v. Ferguson, supra.* The equities, law and logic are with Respondent, Orange County.

II. WHETHER THE PETITIONER HAS WAIVED HIS RIGHT TO SEEK REVIEW OF A FEDERAL QUESTION BECAUSE IT WAS NOT RAISED IN THE TRIAL COURT?

Petitioner has waived his right to raise a federal question by failing to bring it to the attention of the trial court when the appellate rules of the state so require. *Louisville & Nashville Railroad Co. v. Ford,* 234 U.S. 46, 58 L. Ed. 1202, 34 S. Ct. 739; *Erie Railroad v. Purdy,* 183 U.S. 148, 46 L. Ed. 847, 22 S. Ct. 605; *Atlantic Coast Line Railroad Company v. Mims,* 242 U.S. 532, 61 L. Ed. 476, 37 S. Ct. 188.

The rule of appellate review in Florida is that questions not timely raised and ruled upon in the trial court will not be considered on appeal. This rule was founded on consideration of practical necessity in fairness to the trial court and the opposing party. *Hartford Fire Insurance Co. v. Hollis,* 58 Fla. 268, 50 So. 985 (Fla. 1909); *Cowart v. West Palm Beach,* 255 So. 2d 673 (Fla. 1971).

CONCLUSION

Respondent, Orange County, respectfully requests this Court to decline to accept jurisdiction of this cause.

Respectfully submitted,

JAMES F. PAGE, JR.
GRAY, HARRIS & ROBINSON, P.A.
Post Office Box 3068
Orlando, Florida 32802
(305) 843-8880
Attorney for Respondents

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

Appeal No. 79-1508

Orange County, a political subdivision
of the State of Florida,
Appellant,

v.

The State of Florida, on the relation of
Glen E. Smith, as Trustee, and *Ann Ross*,
Appellees.

MOTION FOR REHEARING

As this is an important case to the approximately 1,500 land owners in the former Town of Bithlo, and since it is difficult to determine from the Per Curiam Affirmed decision what points the Court may have overlooked or misconstrued, Appellant requests the Court's grace in filing this lengthy Motion for Rehearing in this long, difficult and complicated matter.

It appears to the Appellant that the questions of whether laches can be raised as a defense to a final judgment, whether a municipality can raise laches, and whether Orange County proved laches by its affidavits, are clearly resolvable in the favor of Orange County. The question that remains is whether or not Orange County is entitled to raise laches. This will be treated in two parts.

The first part will be the question raised by the Court at oral argument not previously raised in the briefs, and the second part will deal with a succinct review of the reasoning on which the appeal was based.

The question that the Court raised at oral argument that was not raised in the Final Judgment or in the Appellee's brief is whether the Second Appellate decision in *Smith v. Town of Bithlo*, 344 So. 2d 1288 (Fla. 4th D.C.A. 1977), reversing Judge Diamantis' decision for Dodd and the Dietrichs on the question of laches, precludes the County from raising the defense of laches to the judicial enforcement of the Final Judgment entered in 1956 because laches is res judicata. The answer is that neither Judge Diamantis' nor the Second Appellate decision decided laches as to the Town of Bithlo. The only decision on laches was as to B. C. Dodd, H. R. Dietrich and Florence Dietrich, his wife. The holding of Judge Diamantis' in Case No. 73-7910, was

"IT IS THEREFORE ORDERED AND ADJUDGED AS FOLLOWS:

1. The Defendants, B. C. DODD and H. F. DIETRICH and FLORENCE DIETRICH, his wife, constituting a class of owners of properties in the Town of Bithlo, Florida, shall go hence without delay, and this action is dismissed as to said Defendants with prejudice. (The class that they represented was a class of people whose property had been previously ousted from the Town of Bithlo.)
2. As to the Defendant, THE TOWN OF BITHLO, FLORIDA, which is in default since no answer and defenses have been filed on its behalf, it cannot raise a defense of laches nor can the individual Defendants raise it on its behalf.

3. However, since the Court has ruled that the evidence does not show that the Plaintiff is entitled to the remedy it seeks for the reasons stated in Paragraph 13 of this Final Judgment, this action is abated as to the Town of Bithlo, Florida.

4. The abatement as to the Town of Bithlo, Florida, shall remain in full force and effect until further order of this Court."

There was never any order dissolving the abatement of the Final Judgment as to the Town of Bithlo. In the Final Judgment, it is clear that no judgment was entered against the Town of Bithlo, which is appropriate since Judge Diamantis found in numbered Paragraphs 9 and 10 of his Final Judgment that

" 9. The government of the Town of Bithlo ceased to function during the Second World War.

10. There is no qualified electorate or person whomsoever in the Town of Bithlo who is willing to perform any of the functions and duties prescribed by any of the provisions of Florida Statutes, Chapter 165, 166, 70 and 171, nor is there any elector or any person whomsoever in said town who is willing to perform any governmental function whatever connected with the conduct, operation and government of said municipality."

Those reasons caused attorney McLeod at the trial to request an attorney ad litem (A-1). The judge refused to do that.

Had the Court appointed an attorney ad litem and had the issue been tried and resolved with finality, res judicata might be an avoidance of Orange County's defense of laches, since the tests for res judicata of (1) finality of the judgment, and (2) identity of parties, would have been substantially met.

However, the question of laches cannot be res judicata since it was not decided in Case No. 73-7910 as to the Town of Bithlo or its citizens. *Shook v. Southern Railway Co.*, 113 S.E.2d 155 (Ga. App.); *Oyster v. Oyster*, 28f 909 Aff'd, *Albright v. Oyster*, 140 U.S. 493, 35 L. Ed. 534, 11 S. Ct. 916; *Kelly-Springfield Tire Co. v. Haugherty*, 219 N.W. 752 (Mich. App.); *Olson v. Colfield School District*, 210 N.W. 180 (Nd). Since all the property owners in the Town of Bithlo were not involved in Case No. 73-7910, there is no identity of parties with Case No. 76-8768. By virtue of § 165.052 Florida Statutes, Orange County does represent all of the property owners of the Town of Bithlo in Case No. 76-8768 and should be able to raise laches.

In Case No. 76-8768, Judge Diamantis misconstrued the nature of the current defense of laches when he used as a reason to grant the Summary Judgment in favor of the Plaintiff, the failure of Bithlo to raise laches as a defense in the 1956 Judgment. The factual basis for the defense of laches has developed since 1956 by the Plaintiff failing to adequately record his Judgment, and then sitting on its rights for a period of 17 years, which has been held by the Second Appellate decision in this matter to be a long enough period for laches to attach. The affidavits show that people purchased property after 1956, some using title insurance and others relying on abstract examination, none of which revealed the Final Judgment of the Plaintiff. Dodd and the Dietrichs had purchased property in Bithlo prior to the 1956 judgment and could not possibly establish laches on the same basis as has been proven by Mr. Lafata and others in affidavits filed by Orange County. They could not and did not represent a class of land owners who purchased land after 1956, as Ann Ross attempted to do by intervening in Case No. 76-8768.

The Town of Bithlo hasn't functioned since World War II and no one could represent it except for an attorney ad litem appointed by the Court, because no attorney would vouch for his authority to do so as required by Rule 1.030 F.R.C.P. Consequently, no one could raise the defense of laches in Case No. 76-8768. Clearly in this legal quagmire, the people of Bithlo were entitled to some representation or to be joined in the lawsuit. They were not joined in Case No. 73-7910 or Case No. 76-8768 (notices of lis pendens were not even filed in either lawsuit to alert subsequent purchasers such as Mr. Lafata, whose affidavit is filed in this matter (R-270-279), nor was legal counsel provided on their behalf to raise the defense of laches.

Now the land owners of Bithlo are told that the defense is waived because it wasn't raised in the lawsuit. If that's not Catch-22, I don't know what is. The land owners are now and have been in a legal Never-Never Land. They have had no way to defend themselves in Case No. 73-7910 or in Case No. 76-8768. To leave them wholly without representation is unconscionable and unjust. Courts of equity have historically fashioned remedies to fit the situation. To date, no due process has been accorded to the post-1956 land purchasers.

The only possible argument for the Appellee here is that the people should have formed a government to represent them. When? In 1956? In 1973? In 1976? And exactly how should the knowledge have come to their attention that it would behoove them to form a government? When Paul Lafata (R-270-279) purchased his land in 1978 after receiving a title insurance policy from American Title Insurance Company, he not only did not know about the 1956 judgment, but he didn't know about Case No. 73-7910 or Case No. 76-8768.

If he had had that knowledge his affidavit states he wouldn't have purchased the property. If laches is res judicata as to Paul Lafata and others like him, what kind of a legal system are we operating? To say that the Plaintiff's rights, long unasserted, and only recently asserted, but without proper public notice now or in 1956, are superior to bona fide purchasers without notice is a travesty of justice.

Orange County respectfully requests this Court to grant a rehearing of this matter and permit oral argument, enter judgment for it on the appeal, or write an opinion and certify that opinion as a question of great public interest.

Respectfully submitted,

/s/ J. Charles Gray
/s/ James F. Page, Jr.
Gray, Adams, Harris & Robinson
P. O. Box 3068
Orlando, Florida 32802
(305) 843-8880
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to Byrd V. Duke, Jr., Esquire, The Executive Building, Suite 205, 1175 N.E. 125th Street, North Miami, Florida, 33161; Steven R. Bechtel, Esquire, 600 Southeast National Bank Building, 201 E. Pine Street, Orlando, Florida, 32801; and to Herbert R.

Swofford, Esquire, P. O. Box 6236, Orlando, Florida, 32803, by mail this 9th day of July, 1980.

/s/ J. Charles Gray
/s/ James F. Page, Jr.
Gray, Adams, Harris & Robinson
P. O. Box 3068
Orlando, Florida 32802
(305) 843-8880
Attorneys for Appellants

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

Case No. 79-1508/T4-648

Orange County, a political subdivision
of the State of Florida,
Appellants,

v.

The State of Florida, on the relation of
Glen E. Smith, as Trustee, and *Ann Ross*,
Appellees.

Opinion filed February 25, 1981

APPEAL FROM THE
CIRCUIT COURT FOR ORANGE COUNTY
George N. Diamantis, Judge

James F. Page, Jr., of Gray, Adams, Harris & Robinson, P.A., Orlando, for Appellants.

Byrd V. Duke, Jr., North Miami, for Appellee Glen E. Smith.

ON MOTION FOR REHEARING

SHARP, W., J.

The motion for rehearing is granted because this court overlooked the fact, due to the voluminous record in this

case and the inadequacy of the briefs, that the City of Bithlo was never defaulted in the prior litigation, and therefore the substituted party, Orange County, should not be foreclosed from raising the defense of laches.

The appellee filed suit in 1956 to recover the principal and interest due on improvement bonds issued by the City of Bithlo in 1924, and obtained a judgment. No action was taken to recover on the judgment until 1973, when suit was filed against Bithlo in case number 73-7910. This suit against Bithlo was "abated" for insufficiency of process. On appeal this judgment was reversed on other grounds.[1] After remand the trial court said Bithlo could not raise the defense of laches because it was "in default," although apparently no default was ever obtained against Bithlo. The trial court then abated the action as to Bithlo because there were no qualified persons who were willing to perform any governmental function connected with Bithlo. This judgment was also appealed.

While the appeal was pending the appellant brought suit for mandamus in an effort to compel Bithlo to levy taxes to pay the judgment. The trial court abated that suit until the appellate court rendered its decision in the case on appeal.

The appellate court was informed that there were persons willing to serve on behalf of Bithlo. It stated that upon remand the trial court could determine the qualifications of these people and make the necessary appointments to represent the City of Bithlo.[2] There is no evidence in the record before us that anyone was ever so appointed or that this action was ever revived.

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[1] Smith v. Bithlo, 314 So. 2d 212 (Fla. 3d DCA 1975).

[2] Smith v. Bithlo, 344 So. 2d 1288 (Fla. 4th DCA 1977).

The lower court ordered that the mandamus suit and the earlier suit travel together as companion cases. Orange County was substituted as Bithlo's "alter ego"[3] and for the first time it sought to raise the defense of laches on behalf of Bithlo. The trial court held Orange County was barred from raising this defense, and that is the issue presented on this appeal.

Bithlo and Orange County never had an opportunity to raise the defense of laches in either suit. During this litigation Bithlo had ceased to function and to exist for all practical purposes, and there were no people or agents to represent it. Both the trial and appellate courts recognized this fact. Bithlo was analogous to an incompetent for whom no guardian had been appointed or a deceased person for whom no personal representative existed. Under these circumstances it would be inequitable to bar Orange County from raising this defense even if the doctrine of res judicata or collateral estoppel applied. *De Cancino v. Eastern Airlines, Inc.*, 283 So. 2d 97 (Fla. 1973). However, since Bithlo was never actually defaulted, and both actions were "abated" as to it, res judicata should not apply in any event. *Burleigh House Condominium, Inc. v. Buchwald*, 368 So. 2d 1316 (Fla. 3d DCA), *cert. denied* 379 So. 2d 203 (1979); *Donaldson Engineering, Inc. v. City of Plantation*, 326 So. 2d 209 (Fla. 4th DCA 1976). The summary judgment appealed is reversed in so far as it forecloses the right of Orange County to plead and attempt to prove the defense of laches. This matter is remanded to the trial court to permit the appellants to file an answer and any affirmative defenses available to it.

REVERSED and REMANDED.

DAUKSCH, C.J. and COBB, J., concur.

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[3] Ch. 77-502, Laws of Florida.

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

Appeal No. 79-1508/T4-648

Orange County, a political subdivision of the State of Florida,

Appellant,

v.

The State of Florida, on the relation of ***Glen E. Smith***, as Trustee, and ***Ann Ross***,

Appellees.

MOTION FOR REHEARING

The State of Florida, on the relation of Glen E. Smith, as trustee, Appellee in the above-styled cause, by and through his attorney, respectfully moves this Court to set aside and withdraw its decision and opinion entitled "On Motion for Rehearing" filed February 25, 1981, reversing the Final Summary Judgment and Order on Other Pending Matters rendered by the trial court for this Appellee and to rehear this cause on the following grounds:

(A) This Court has overlooked or misapprehended the following points of law, or facts:

1. The Town of Bithlo was defaulted in the prior litigation, case no. 73-7910, Circuit Court in and for Orange County, Florida, said defaults having been entered on

January 14, 1974, on page 44 (A-1) and again on June 4, 1974 on page 75 (A-2). Because this Court has gone beyond the scope of the record of case no. CI 76-8768 it is necessary to file an appendix to clear up misapprehension of facts by this Court and to aid the Court to locate pleadings or documents filed in the voluminous record of the case on appeal:

(a) Copy of Entry of Default by Clerk against the Town of Bithlo filed January 14, 1974 (A-1).

(b) Copy of letter dated August 9, 1976 and Amended Index (case 73-7910) furnished for the appeal to the 4th District Court of Appeal of Florida, case no. 76-808, Smith vs. Bithlo, 344 So. 2d 1288, Fla. DCA 1977 (A-2).

(c) Order for Substitution of Orange County, Florida, a political subdivision of the State of Florida, in the former litigation (A-3).

2. In Smith vs. Bithlo, 314 So. 2d 212 Fla. (4th DCA 1975), the Court is correct that the suit was "abated" for insufficiency of process. The Appellate Court reversed the case holding that service was valid via Fla. Stat. § 48.111(3) 1973 and also Fla. Stat. § 49.021 (1973) and should not have been abated for lack of service. The other error was that Plaintiff (bond holder) was not a party to the Defendant's judgment of ouster and Plaintiff's claim was not barred. Both defaults against the Town of Bithlo were in effect during the first appeal.

3. The record of this Mandamus proceeding in Petition for Writ of Mandamus (R 1-5) is evidence that Earl Taylor, as Mayor; Ted McElwee, David Shaw, Ralph Kemp, Hobart Strickland and Richard Trimble, as aldermen of the Town of Bithlo, represented the Town in this action, and appeared by counsel (Motion To Dismiss, Consolidate, Reassign or Abate (R 23-40) and Order

Denying Motion To Dismiss and Consolidate Order Transferring Cause (R 32-33)).

4. Pursuant to Section 165.052 the Secretary of State declared the Town of Bithlo to be an inactive municipality and proper notice was filed and published. The legislature of the State of Florida passed Chapter 77-502, Law of Florida, Acts of 1977 to take effect July 1, 1977, abolishing the Town of Bithlo.

5. Second Amended Petition for Writ of Mandamus was filed on April 6, 1978 (R 55-70) and Orange County and each member of the Board of County Commissioners were named Defendants (R 88-89) and were duly served.

6. Orange County and the members of the County Commission filed Answer (R 115) to Alternative Writ of Mandamus which set up only defense of laches and barred by the statute of limitations, all other matters in Petition and Writ were admitted.

7. The legislature by Chapter 77-502, Law of Florida, Act of 1977 abolished the Town of Bithlo, transferring all property to Orange County and provided:

> "and all legal and lawful debts and obligations of the town shall be satisfied with the procedure provided in general law, ..."

Florida Statute 165.09(3) authorizes the county to levy and collect ad valorem taxes from the area of the pre-existing town for repayment of any assumed debts. See also F.S. 165.061(3).

8. Attached to the Motion for Summary Judgment (R 119) is attached a Final Judgment (R 121-126) in case 7910 and on page 126 the trial judge adjudged:

> "2. As to the Defendant, The Town of Bithlo, Florida which is in default since no answer and defenses have been filed on its behalf, it cannot

raise the defense of laches nor can the individual Defendants raise it on its behalf. This same Final Judgment is attached to memorandum of law (R 187) and also is included in Appellant's Appendix to Brief of Appellant (A 1 A-2) and Supplementary Memorandum of Law and Compliance with 5(13) of Order Setting Non Jury Trial and Pre-Trial Instructions (R 682-638)."

9. In the Final Judgment, case 73-7910, included in this record as described above, the Court found it has jurisdiction of the parties and of the subject matter. That service on the Defendant, Town of Bithlo, was valid.

10. In such Final Judgment on page 6 attached to Motion for Summary Judgment (R 119) is the following adjudication:

"2. As to the Defendant, The Town of Bithlo, Florida, which is in default, since no answer and defenses have been filed on its behalf, it cannot raise the defense of laches nor can the individual defendants raise it on its behalf."

11. Parties may not relitigate matters actually litigated and determined in prior suits, Bardwell v. Langston, 244 So. 2d 742 (Fla. 4th DCA 1971); Nelson v. Rever, 294 So. 2d 879 (Fla. 3rd DCA 1972).

12. Rules of Civil Procedure, Rule 1.500(e) reads: Final Judgment after default may be entered at any time but no such judgment may be entered against an *infant* or *incompetent person* unless represented in the action by a general guardian, committee, conservator or other representative who has appeared therein.

13. F.S. 744.102 defined "guardian", "guardian ad litem", "incompetent", "minor", does not indicate that the Town of Bithlo was dead or an incompetent to

prevent the Final Judgment from being entered against it after default.

14. A default judgment rendered by a Court having jurisdiction of subject matter, regular on its face, is not void or amenable to collateral attack. Ennis v. Giblin, 147 Fla. 113, 2 So. 2d 382 (Fla. 1941).

15. The Defendant, Orange County, and its officials are bound by the judgment against Bithlo in the 1973 litigation. They cannot now raise laches on behalf of the Bithlo property owners who are equally bound by that judgment in the 1973 mandamus action. Young v. Miami Beach Improvement Co., 46 So. 2d 26, 30 (Fla. 1950); City of New Port Richey v. State ex rel. O'Malley, 145 So. 2d 903 (Fla. 2nd DCA 1962).

16. Where defenses are insufficient as matter of law, it is without legal probative force and the trial judge would be entitled to enter a Summary Judgment. Home Federal Savings and Loan Association of Hollywood v. Emile, 336 So. 2d 473 (Fla. App. 3rd 1976).

17. Where Plaintiff must show that affirmative defenses have no basis in fact to be entitled to a Summary Judgment, Defendant cannot by raising purely paper issue forestall granting of relief where pleading and evidentiary matters before court show that in fact or law. Reflex, N.V. v. Urmet Trust, 336 So. 2d 473 (Fla. 3rd 1976).

18. Orange County failed to raise an issue about the default in previous case in opposition to Motion for Summary Judgment and did not raise an issue of material facts and Appellee was entitled to a Summary Judgment. Connolly v. Sebeco, Fla. 89 So. 2d 482.

19. A judgment against a municipal corporation is a matter of great interest to all its citizens. It is binding

on the latter, even though not a nominal parties to such judgment and cannot relitigate which are litigated in the original action against the municipality or its legal representatives. If the municipality fails to avail itself of legal defenses, the people are concluded by the judgment. Sec. 245, Judgment 123 Fla. Juris.

20. In the prior litigation, the trial Court in the Final Judgment, 73-7910 dated the 2nd day of April, 1976 (R 121-126) held that Bithlo never raised the defense of laches and also held that Bithlo had a legal duty to the Plaintiff to levy and collect the necessary taxes to pay the Plaintiff's judgment and Bithlo owes the amount of the judgment. This portion of judgment was not reversed in Smith v. Town of Bithlo, 344 So. 2d 1288 (Fla. 4th DCA 1977).

21. RCP Rule 1.210(b) provided for the appointment of a Guardian ad Litem for only an infant or incompetent person, Fla. Statutes 65.061, and appears to be the only statute involving Guardian ad Litem, and it has no application here. The rule and statute are clearly for an infant or incompetent person and not for an inactive municipal corporation.

22. Statement in the decision stating Bithlo was analogous to an incompetent for whom no guardian had been appointed or a deceased person for whom no personal representative existed is contrary to existing law or the application thereof.

23. Where a valid legislature mandate is clear the Court does not have the judicial power to ignore it or otherwise hold it for naught because a judge personally thinks the problem should be handled in some other fashion. Twomby v. Clayshon, 234 So. 2d 338 (Fla. 1979). To determine the legislature's intent we look to the plain language of the statute. The law clearly requires

that the legislature's intent be determined primarily from the language of the statute is to be taken, construed and applied in the form enacted. Thayer v. State, 335 So. 2d 815 (Fla. 1976). See Seasons v. Johnson, 378 So. 2d 1260 (Fla. 5th DCA 1979).

24. This Court is not to determine issue not raised by the pleadings nor presented to the trial court, or not argued in the Appellant's brief. This Court should not go beyond the record as to matters. Widmeyer v. Olds, 144 So. 2d 825 (Fla. DCA 2nd 1962).

25. Since Bithlo did default, res judicata should apply. F.S. 95.05 makes a certified copy of judgment prima facia evidence of the entry and validity of such judgment. The Appellee in this mandamus action, is seeking the same relief upon the 1956 Judgment that he sought in the 1973 mandamus action against Bithlo (R 787-792) (page 791).

Parties and privie thereto are bound by a judgment and was effective against Orange County, and the tax-payers and owners of property in the former Town of Bithlo.

Appellee, therefore moves this Court to reconsider its decision dated February 25, 1981, and to withdraw it and reinstate its decision, per curiam, affirming the Summary Final Judgment of the trial Court.

Respectfully submitted,

/s/ Byrd V. Duke, Jr.
Attorney for Appellee
The Executive Building, Suite 205
1175 N.E. 125th Street
North Miami, Florida 33161
(305) 891-2532

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to Steven R. Bechtel, attorney for Defendants; Ford S. Hausman, property appraiser; and Earl R. Wood, as tax collector for Orange County, Florida, at Southeast National Bank Building, Suite 600, Orlando, Florida; and to James F. Page, Jr., attorney for Orange County, Florida, and its County Commissioners, at P. O. Box 3068, Orlando, Florida, this 10th day of March, 1981.

/s/ Byrd V. Duke, Jr.

[Received: March 12, 1981]

APPENDIX D

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

Case No. 79-1508/T4-648

Orange County, etc.
Appellant,

v.

The State of Florida, on the relation of
Glen E. Smith, etc., et al.,
Appellee.

Date: April 2, 1981

BY ORDER OF THE COURT:

ORDERED that Appellee's MOTION FOR REHEARING, filed March 12, 1981, is denied.

I hereby certify the foregoing is (a true copy of) the original court order.

Frank J. Habershaw, Clerk

By: /s/ Rowland W. Halliday
Deputy Clerk

[Court Seal]

cc: Byrd V. Duke, Jr., Esquire
Steven R. Bechtel, Esquire
James R. Page, Jr., Esquire

APPENDIX E

SUPREME COURT OF FLORIDA

Case No. 60,512

District Court of Appeal
Fifth District No. 79-1508/T4-648

Glen E. Smith,
Petitioner,

v.

Orange County, etc., et al.,
Respondents.

Wednesday, July 15, 1981

This cause having heretofore been submtitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ADKINS, Acting C.J., OVERTON, ENGLAND, ALDERMAN and MCDONALD, JJ., concur.

A True Copy

TEST:

/s/ Sid J. White
Clerk, Supreme Court

cc: Hon. Frank J. Habershaw, Clerk
W. D. Goreman, Clerk
George N. Diamantis, Judge
Byrd V. Duke, Jr., Esquire
Steven R. Bechtel, Esquire
James F. Page, Jr., Esquire
Herbert R. Swofford, Esquire

APPENDIX F

IN THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

Case No. CI 76-8768

The State of Florida, on the relation of ***Glen E. Smith***, as trustee,

Plaintiff,

v.

Orange County, a political subdivision of the State of Florida; ***Allen E. Arthur***; ***Lee Chira***; ***Dick Fischer***; ***Jack Marin***; and ***Lamar Thomas***, as members and constituting the Board of County Commissioners of Orange County, Florida; ***Ford S. Hausman***, Property Appraiser, Orange County, Florida; ***Earl K. Wood***, as Tax Collector, Orange County, Florida,

Defendants,

AND

Ann Ross,

Intervenor and Class Representative.

FINAL SUMMARY JUDGMENT

This cause having come on for hearing on the Motion for Summary Judgment filed by Defenant, ORANGE COUNTY, and the Court having considered same; having reviewed the pleadings, exhibits, and copies of the

Affidavits filed November 9, 1981, the Affidavits were exhibited to the Court, and the Court having relied on same; having heard arguments of counsel; and being otherwise fully advised in the premises, it is therefore,

ORDERED AND ADJUDGED that in accordance with the Order granting Defendant's Motion for Summary Judgment dated December 1, 1981, Final Judgment is hereby entered in favor of Defendant, ORANGE COUNTY, and Intervenor, ANN ROSS, and against the Plaintiff.

DONE AND ORDERED in Chambers in Orlando, Orange County, Florida, this 16th day of December, 1981.

The party preparing/presenting this paper will, under the direction of the Court, serve same and so certify hereon, with date.

/s/ Claude R. Edwards
Circuit Court Judge

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished by mail this 16th day of December, 1981, to JAMES F. PAGE, JR., ESQUIRE, Gray, Harris & Robinson, P. O. Box 3068, Orlando, Florida 32802; BYRD V. DUKE, JR., ESQUIRE, The Executive Building, Suite 205, 1175 N.E. 125th Street, North Miami, Florida 33161; and HERBERT R. SWOFFORD, ESQUIRE, 1212 East Colonial Drive, Orlando, Florida.

[Signature]
Secretary to Circuit Judge

APPENDIX G

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT
July Term 1982

Case No. 82-94

The State of Florida, on the relation of ***Glen E. Smith***, as trustee,

Appellant,

v.

Orange County, etc.; ***Allen E. Arthur***; ***Lee Chira***; ***Dick Fischer***; ***Jack Martin***; and ***Lamar Thomas***, etc.; ***Ford S. Hausman***, etc.; ***Earl K. Wood***, etc.; and ***Ann Ross***, etc.,

Appellees.

Decision filed September 29, 1982

APPEAL FROM THE
CIRCUIT COURT FOR ORANGE COUNTY
Claude R. Edwards, Judge

Byrd V. Duke, Jr., North Miami, for Appellant.

James F. Page, Jr., of Gray, Harris & Robinson, P.A., Orlando, for Appellees.

PER CURIAM. AFFIRMED.

ORFINGER, CJ., DAUKSCH and UPCHURCH, F., JJ., concur.

Not final until the time expires to file rehearing motion, and, if filed, disposed of.

APPENDIX H

SUPREME COURT OF FLORIDA

Case No. 62,806

District Court of Appeal, 5th District
No. 82-94

Glen E. Smith, etc.,
Petitioner,

v.

Orange County, etc., et al.,
Respondents.

Friday, October 29, 1982

It appearing to the Court that it is without jurisdiction, the Petition to Invoke Inherent or Implied Jurisdiction to Prevent the Taking of Property Without "Due Process" in Violation of the 5th and 14th Amendments of U.S. Constitution and the Florida Constitution and the Declaration of Rights and Discretionary Jurisdiction is hereby dismissed.

A True Copy

TEST:

/s/ Sid J. White
Clerk, Supreme Court

cc: Hon. Frank J. Habershaw, Clerk
Hon. William D. Gorman, Clerk
Hon. Claude R. Edwards, Judge
James F. Page, Jr., Esquire
Herbert R. Swofford, Esquire
Byrd V. Duke, Jr., Esquire

APPENDIX I

FLORIDA STATUTES
SECTION 165.052(3)

SPECIAL DISSOLUTION PROCEDURES

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(3) If any municipality or special district declared inactive pursuant to this section owes any debt at the time of proclamation, any property or assets of such unit, or which belonged thereto at the time of such proclamation, shall be subject to legal process for payment of such debt. After the payment of all the debts of said inactive municipal or special district corporation, the remainder of its property or assets shall escheat to the county wherein located. If, however, it shall be necessary, in order to pay any such debt, to levy any tax or taxes on the property in the territory or limits of the inactive municipality or special district, the same may be assessed and levied by order of the county commissioners of the county wherein the same is situated, and shall be assessed by the county property appraiser and collected by the county tax collector. The proceedings in the assessment, collection, receipt, and disbursements of such taxes shall be like the proceedings concerning county taxes as far as applicable.

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